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IN THE

# Supreme Court of the United States

October Term, 1982

No. 82-437

COUNTIES OF MAHNOMEN and CLEARWATER, MINNESOTA; and ELMER H. WINTER, et al.,
*Petitioners,*

vs.

WHITE EARTH BAND OF CHIPPEWA INDIANS; UNITED STATES OF AMERICA; and JOSEPH N. ALEXANDER, et al.,
*Respondents.*

## RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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The Respondent, White Earth Band of Chippewa Indians, respectfully requests that this Court deny the petition for a writ of certiorari sought by the two intervening counties and the individual intervenors, to review the decision of the United States Court of Appeals for the Eighth Circuit.

### STATEMENT OF THE CASE

This litigation was commenced in 1974 with the filing of a complaint for declaratory and injunctive relief by the Respondent, White Earth Band of Chippewa Indians, after numerous arrests of Band members for fishing and hunting violations within their Reservation. The Band sought a

declaration that its members and members of the Minnesota Chippewa Tribe were entitled to hunt, fish, trap and gather wild rice without any interference, regulation, control or licensing by the Defendants, officials of the Minnesota Department of Natural Resources, and that the Band and Tribe had jurisdiction to regulate those activities by non-Indians and Indians alike within their Reservation.

Subsequently, the United States filed suit against the State of Minnesota seeking to prohibit the State from enforcing its hunting, fishing, trapping and wild ricing laws against Band and Tribal members within the White Earth Reservation. These cases were consolidated by the District Court on January 20, 1975.

In the fall of 1974 the Minnesota Counties of Clearwater, Mahnomen and Becker were allowed to intervene as parties Defendant as was a separate group of individual residents of the Reservation area.

The federal court action was held in abeyance by agreement of the parties and with the approval of Judge Devitt, pursuant to specific requests of the two petitioner counties, the State and Becker County contained in their Answers, and oral requests to the Court in order to allow the State courts to hear certain issues in the litigation. During that period the issue of the disestablishment of the White Earth Reservation was litigated through the State court system. The result of that litigation was *State of Minnesota v. Clark*, 292 N.W.2d 902 (Minn. 1979), cert. denied, 445 U.S. 904 (1980), holding that the White Earth Reservation was not disestablished by the Nelson Act of 1889, 25 Stat. 642, and therefore, the State had no jurisdiction over hunting, fishing and gathering activities of Chippewa Tribe members within 32 townships of the original 36 township

1867 Reservation. Specifically unresolved by *Clark* was the status of four northeastern townships of the original 36 township Reservation which were the subject of a cession agreement between the Band and the United States and in which no allotments were made.

In February, 1980, subsequent to the denial of certiorari in *Clark* by the United States Supreme Court, Respondent moved to preclude relitigation of the disestablishment issue as it affected the 32 township Reservation. Judge Devitt granted that motion on May 30, 1980.

The case was argued before Judge Devitt on May 13, 1981. Judgment was entered on June 25, 1981 declaring that (1) the White Earth Band is entitled to hunt, fish and gather wild rice free from State licensing or regulation on the White Earth Reservation; (2) the White Earth Reservation was diminished by the cession of four northeastern townships; (3) the White Earth Band has a statutory right to condition entry on Indian lands by non-members for hunting, fishing or wild rice gathering.

An injunction was issued permanently enjoining the State of Minnesota from enforcing its game and fish laws on the White Earth Reservation against members of the White Earth Band.

On July 27, 1981 the intervening Counties filed a timely Notice of Appeal from the preclusion Order of the District Court dated May 30, 1980 as did the individual Intervenors on August 10, 1981. The State Defendants appealed the May 30, 1980 Order on August 4, 1981 in order to preserve their rights from any *res judicata* effect. The Respondent Band cross-appealed on August 10, 1981 from so much of the District Court's Judgment as diminished their Reservation by four townships and determined that

Minnesota has authority to regulate non-member hunting, fishing, trapping and wild rice activities on Indian trust or allotted lands.

The Court of Appeals affirmed the judgment of the District Court in all respects. It held that there had been no abuse of discretion "in finding that the counties had a full and fair opportunity to litigate their claims in *Clark* and are collaterally estopped from relitigating the question of disestablishment." (Pet. App. 13a)

## REASONS FOR DENYING THE WRIT

### 1. There is no conflict between the decision of the Eighth Circuit and decisions of this Court.

The Petitioners argue that the decision of the Eighth Circuit conflicts with decisions of this Court dealing with collateral estoppel.

The Petitioners conceded in the District Court and the Court of Appeals that all the elements of collateral estoppel were present in this case. (Pet. App. 9a-9b). They sought discretionary relief from the application of the collateral estoppel doctrine based upon an asserted change in law. The Court of Appeals held that even if disestablishment is a question of law only, there was no change in law. The Court of Appeals was clearly correct.

*State v. Clark*, 282 N.W.2d 902 (Minn. 1979), *cert. denied* 445 U.S. 904 (1980) is the decision which forms the basis of the estoppel. That case was decided in 1979 and *certiorari* was denied by this Court in 1980. The Petitioners argue that the "change of law" occurred when the District Court and the Eighth Circuit decided *United States v. Minnesota*, 466 F.Supp. 1382 (D. Minn. 1979), aff'd sub.

nom. *Red Lake Band of Chippewa Indians v. State of Minnesota,* 614 F.2d 1161 (8th Cir.), *cert. denied* 449 U.S. 905 (1980), and found Congress had an intent in the Nelson Act, 25 Stat. 642, to diminish some parts of the Red Lake Chippewa reservation in Minnesota. This intent, argue the Petitioners, now makes *Clark* wrong and an instrument of injustice to the counties whose boundaries include the White Earth Indian Reservation.

Both Judge Devitt, who decided *United States v. Minnesota, supra* (Red Lake case) and the Court of Appeals which affirmed his decision have concluded that there has been no change in law as a result of their Red Lake decisions and, therefore, no reason to exercise discretion to relieve the counties of the preclusive effect of *State v. Clark, supra,* on the 32 township White Earth reservation disestablishment issue.

Nowhere is there any conflict with a decision of this Court. Both *Commissioner v. Sunnen,* 333 U.S. 591 (1948) and *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979) were followed by the Court of Appeals and the District Court. Those Courts merely declined to accept Petitioners' evaluation that between 1979 and 1981 there had been a sufficient change in law to warrant application of the discretionary rule. Since both of those courts were construing their own decisions, there is no conflict with any decisions of this Court. What the petitioners seek is another opportunity to argue that the Minnesota Supreme Court was wrong in *State v. Clark.* It is protection against just such an imposition on a litigants' and the judicial system's resources that is one of the purposes of collateral estoppel. *Montana v. United States,* 440 U.S. 147 (1979).

**2. This case raises only issues of a possible abuse of discretion and turns on facts peculiar to this litigation.**

The Petitioners and their co-parties below specifically requested the federal court to defer a decision on the reservation disestablishment question to the state courts. (Pet. App. 7a). That decision went against them in both the state trial court and the Minnesota Supreme Court, *State v. Clark, supra.* Certiorari was denied by this Court. They sought, in the federal court, an opportunity to relitigate that question. The issue presented by the Petitioners in their certiorari petition is whether the Eighth Circuit has read the "change in law" exception to the collateral estoppel doctrine too "rigidly." These Petitioners are not the appropriate parties to raise that general question since they specifically sought deferral of the federal court action in order to pursue the disestablishment issue in the state courts. Even if this Court should deal with the scope of the change in law exception in some future case, this case does not properly present that issue. These Petitioners specifically sought to have the underlying issue determined in the state courts for some perceived advantage. They should be bound by that choice.

A decision from this Court on the scope of the change in law exception, rendered in a case in which the very courts which are said to have created the change, yet which have found no change, would not provide much direction to the lower courts. Such a decision could only deal with the peculiarities of this particular litigation.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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